United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1731

To be argued by
JOEL N. ROSENTHAL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1731

UNITED STATES OF AMERICA,

Appellee,

—v.—

PETER OTTLEY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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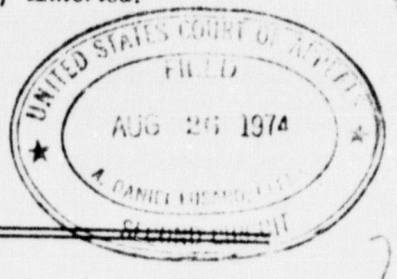

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Preliminary Statement

Peter Ottley appeals from a judgment of conviction entered on May 1, 1974 in the United States District Court for the Southern District of New York, after a two-week trial before the Honorable Marvin E. Frankel, United States District Judge, and a jury.

Indictment 73 Cr. 830, filed on August 29, 1973, in 46 counts charged appellant Peter Ottley and two others, Peter Byrne and Herman Soloway, with violating Title 18, United States Code, Sections 2, 371, 664 and 1027 and Title 29, United States Code, Sections 431(b), 436, 439(a) and (d), 501(c) and 503(a) (The Labor-Management Reporting and Disclosure Act of 1959).

The indictment charged appellant with (1) causing the union local of which he was chief executive officer to

make unlawful loans to himself (Counts 1 through 5); (2) failing to disclose these loans in reports filed by the union with the Secretary of Labor (Counts 6 through 9); (3) failing to maintain records concerning reimbursed cash expenses paid to him as a union officer sufficient to permit verification of the annual reports filed by the union (Count 10); (4) conspiracy to prepare false vouchers to substantiate reimbursed expenses paid to him (Count 11); (5) embezzlement of union funds for his personal expenses (Counts 12 through 27); (6) aiding and abetting defendant Byrne, a fellow union officer, in the embezzlement of union funds for Byrne's personal expenses (Counts 28 through 30); (7) embezzlement of union funds by purchasing insurance with union moneys to pay for a pension for himself (Count 31); (8) embezzlement of moneys belonging to union welfare and pension funds for personal expenses (Counts 32 through 34); and (9) making false statements concerning the moneys embezzled from the welfare and pension funds in reports signed by him as trustee for these funds with the Secretary of Labor (Counts 35 through 46).

Trial commenced as to Ottley on March 1, 1974.* Counts 11 and 27 were dismissed on the Government's motion when the trial began. At the conclusion of the Government's case, the District Court granted a judgment of acquittal as to Counts 1 through 9 and 35 through 46.

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* On February 22, 1974, Byrne was sentenced to a six-month term of probation and a $500 fine upon his plea of guilty to one count of the indictment (Count Five) charging him with causing the union to make a loan to Peter Ottley of $17,709.00 in violation of 29 U.S.C. § 503(a) and 18 U.S.C. § 2. The remaining counts were dismissed against Byrne at the time of sentence.

Soloway, an accountant, was severed from the trial of Ottley and a nolle prosequi was filed as to Count 11 in which he was charged with conspiring to prepare false vouchers to substantiate reimbursed expenses for Ottley.

The jury convicted Ottley on three counts: Count 10, failure to maintain records to substantiate his claim for weekly reimbursed cash expenses, and Counts 28 and 29, aiding and abetting defendant Peter Byrne in the embezzlement of union funds by causing the union to pay for the lease of a car for Byrne and to pay for its gas and oil, without authorization and knowing that the automobile was not used for union purposes. Appellant was acquitted on the remaining counts.

On May 1, 1974 Judge Frankel sentenced Ottley to a three month term of imprisonment on Count 10 and fined him $5,000 on each of Counts 10, 28 and 29, making a total of $15,000.* Ottley is at liberty pending this appeal.

Statement of Facts

A. Background

From 1968 to 1972, the period covered by the indictment, Peter Ottley and Peter J. Byrne were President and Secretary-Treasurer, respectively, of Local 144 Hotel, Hospital, Nursing Home and Allied Employees Union (AFL-CIO) (hereinafter referred to as "Local 144" or the "Local"). Ottley was Vice President and member of the Executive Board of the half-million member Service Employees International Union ("S.E.I.U." or the "International") of which Local 144 was the second largest affiliate (Tr. 3-4, 8-9, 728).** Ottley was Chairman of each of the six Boards of Trustees of the Welfare and Pension funds associated with the three divisions of Local 144 and Executive Vice President of the New York Hotel Trades Council. He also had been Director of Civil Rights for the S.E.I.U. (Tr. 65, 81, 185, 527, 889, 1050, 1059, 1152, 1173, 1207-1208).

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* The conviction on each count bars appellant from serving as a union officer for five years (29 U.S.C. § 504).

** "Tr." refers to pages of the trial transcript.

From 1950, Ottley served as the chief executive officer of Local 144, repeatedly winning re-election without serious opposition. He was the moving force behind the increase in the membership of the Local from 7,000 to more than 20,000 members (Tr. 8, 31, 301-302, 376-377, 434-436, 475-477, 509, 719-720, 1044-1050).

The Executive Board of Local 144, the general membership of the Local and the Board of Trustees of the various welfare and pension funds seldom took any action without Ottley's approval (Tr. 102,103, 295-296, 426-427, 430, 486, 496-497, 506, 801, 836-837, 872).

Appellant frequently attended and participated in labor conferences as a representative of the Local and the S.E.I.U., and was active in various organizations for the education of the membership and promotion of the labor movement (Tr. 324, 332-334, 501-503, 723).

Ottley established through his own testimony and cross-examination of government witnesses the story of his steady rise in the labor movement from humble beginnings as an elevator operator, his consummate skill as a negotiator, his devotion to his Local and labor in general. In short, Ottley was painted as a friend of labor and labor lawyers, and knowledgeable in the labor field. But the evidence also showed that he was a dictator within his Local who repeatedly ignored the constitutional mandates of the union (Tr. 295-296, 426-427, 430, 486, 496-497, 504-506, 691-696, 789-790, 801, 813-814, 316-817, 818-820, 836-837, 843-847, 866, 872-874, 902-903, 966-967, 969, 1037, 1056, 1058, 1130).

Ottley and Byrne in their official capacities approved all bills sent to Local 144. The bills were paid by checks drawn on checking accounts of Local 144 and signed by Ottley and Byrne who were joint and only signatories (Tr. 242, 568-570, 581-582, 621-622, 627-628, 639-640, 630, 646-649, 1162-1166).

B. Failure to Maintain Records

Beginning in 1959, when the Labor Management Reporting and Disclosure Act ("LMRDA") became law, the International took steps to acquaint its officers and members with the salient features of the statute. In 1959 Ottley attended a conference held by the International at which the then new requirements of the Act were explained. The International also mailed literature concerning the LMRDA to officers and members of the various Locals, including Local 144. The attorney for the International, Harold Israelson, testified that at quarterly Executive Board meetings of the International, which the evidence showed Ottley attended, lectures were given to keep the officers advised of the developments in that law. Ottley himself admitted that literature from the S.E.I.U. was received in the office of the Local and that he sometimes read it (Tr. 9-13, 14-18, 473-475, 482-484, 612-613A, 620-621, 1039 *et seq.*, 1113-1124, 1143-1144, 1148; GX 47, 47(a), 47(b), 47(c), 49(a), 81.

Ottley and Byrne were the only officers of the Local who were authorized to receive reimbursed expenses for monies expended in pursuance of the Local's business (Tr. 379, 339-400, 424-425, 581-585, 621-622, 677-678, 1061-1070, 1267, 1301-1302; GX 12). Neither made or retained any proof of the underlying expenses for which reimbursement was claimed.*

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* According to Ottley, these reimbursed expenses compensated him for out-of-pocket expenditures he paid for taxis, lunches, parking fees and gifts to unemployed members of the Local (Tr. 1064). The petty cash vouchers for Ottley's reimbursed expenses averaged approximately $5,000 each year. None of them identified in any way the nature of the expenditure and merely reflected an amount claimed by Ottley as expenses. Some of the expenses for which he was reimbursed were incurred by appellant while engaged in his duties as an officer or the International. Nonetheless, he charged these expenses to the Local (Tr. 1160).

Ottley testified that he knew that the LMRDA was "restrictive . . . legislation" for the "protection of the funds of these various organizations" "by [requiring] proper records" and that he was aware that such records were required to be kept for 5 years (Tr. 1123-1124, 1149; GX 10(d)). In connection with these reimbursed expenses, Ottley asserted that he made "notes" regarding his weekly expenditures, kept them until the petty cash voucher claiming a total amount of expense for the week was prepared and then destroyed the "notes". However, no such notes were ever seen by his office manager, Mrs. Wachtel, to whom the vouchers were submitted (Tr. 1145-1157).

The only "record" of reimbursed expense kept by Ottley was a weekly petty cash voucher submitted by him or on his behalf by Mrs. Wachtel. The information contained on the voucher was sparse at best: the date, the amount claimed by Ottley and usually his signature. While admittedly aware of the record keeping requirement concerning reimbursed expenses, Ottley attempted to justify his practice by claiming that he received advice from an unidentified person with the Internal Revenue Service, during a 1959 audit of his tax return, that the petty cash vouchers as kept, were sufficient for Internal Revenue purposes.*

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* In colloquy at the bench the Court declined to allow further testimony on the question of reliance on this claimed advice, unless Ottley could identify the auditing agent. Ottley did not attempt to adduce further evidence on the point (Tr. 1063-1068). Byrne testified that he had received some advice from a Mr. Barnham, an accountant for Local 144, now deceased. As a result of that advice, Byrne claimed reimbursed expense payments, but, in contrast to Ottley, noted estimates of the various expenses identified by category. However, he also did not retain contemporaneous documents, *e.g.*, bills or receipts, to evidence these claimed expenditures (Tr. 677-678).

Ottley's claims for reimbursed expenses were frequently based on estimates made either by Ottley or by his office manager, Mrs. Wachtel (Tr. 621-622, 1259, 1271). If the amount estimated by Mrs. Wachtel exceeded the amount Ottley believed he had actually spent, there was no adjustment. Nor was an adjustment made when the "reimbursed expense" failed to cover the amount actually expended (Tr. 582-588, 1149-1156).

In addition to receiving reimbursement for out-of-pocket cash expenses through the submission of petty cash vouchers, Ottley and Byrne used various credit cards issued in the name of the Local. These bills were approved by Ottley for payment, who then signed the checks of the Local in payment therefor.* Further, Ottley and Byrne incurred expenses at restaurants, (including Spindletop and A La Fourchette) which were submitted to the Local for payment each month. No copies of those bills were retained (Tr. 589-591, 1150, 1157). With respect to the payment of both the restaurant and credit card bills, Ottley was the sole judge as to whether the expense was a "personal", or "union" expense. Mrs. Wachtel took his word and the "union" expenses were paid from the Local's treasury.

c. Embezzlement of Auto Expenses

Since 1937 Peter Byrne and Peter Ottley had been close associates in the management of Local 144 and in its predecessor. During that period Byrne never drove a motor vehicle, and in fact could not do so because of a childhood eye ailment.

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* Ottley had American Express, Diners Club, Carte Blanche and two gasoline company cards; Byrne used American Express, Diner's Club and Texaco credit cards (Tr. 585-592, 614, 627, 628, 630, 645-649, 1157).

In 1962 Peter Ottley suggested to Byrne that the latter have the use of leased automobile at the expense of Local 144. Byrne told Ottley that he had no driver's license and that he could not obtain one because of his poor vision (Tr. 1303-1304). Ottley nonetheless executed the original auto lease and several subsequent leases (Tr. 1305). Ottley also authorized the use by Byrne of a Texaco credit card on which gasoline was purchased for the car (Tr. 614-618, 670-671, 675; GX 9). During the period covered by the indictment, union funds in excess of $9,000 were paid to the auto leasing company for Byrne's cars and over $2,700 to Texaco for gasoline and oil used. The Executive Board of the Local never authorized the use of such a car for Byrne or payment for its operating exepnses.

Byrne never drove the vehicle which was leased on his behalf. Between 1968 and 1972 the cars leased for Byrne were used exclusively by Byrne's wife to transport herself from the Byrne's Harrington Park, New Jersey residence to her place of business at Flower and Fifth Avenue Hospital on 106th Street in Manhattan. During the trip Mr. Byrne was driven to a subway at 110th Street in Manhattan. The car remained parked all day at a parking lot convenient to the hospital, parking fees being paid by Mrs. Byrne, who purchased all of her gas and oil on the union credit card (Tr. 672-673; GX 37, 38).

There is no evidence that Byrne or anyone else used this leased automobile to travel on union business. When it became necessary for Byrne to travel by auto in connection with his duties as a union official, he used taxis for transportation, and indeed every week claimed an amount for reimbursed expenses for their use, which Ottley himself approved for payment. The car's only claimed connection to the union was the fact that Byrne rode in it to his wife's place of employment from where he traveled by subway to Local 144 headquarters, sometimes reversing the process on the return trip. Byrne admitted that the

leasing of his car was not authorized by either the Executive Board or the membership, but expressed his opinion that the car was used for union business to the extent that it provided partial transportation for him to and from work (Tr. 616-619, 674-675). This opinion is the sole shred of "evidence" on which the claim of union benefit was advanced.

Ottley admitted that he had no idea whether or not Byrne drove the leased car* or for what purpose Byrne used it (Tr. 1212-1214). He said that there was a "general understanding" among members of the Executive Board since the 1950's that business agents should be supplied transportation in the form of a leased car to enable them to perform their duties. Although Ottley conceded that Byrne was not a business agent, he maintained that Byrne was in the same category. Ottley admitted that he knew there was no specific authorization from the Executive Board or the membership for the leasing of Byrne's car (Tr. 1210-1212).**

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* Ottley, however, was aware that Byrne suffered from severe eye ailments, having visited Byrne in the hospital during the latter's convalescence from a series of eye operations for cataracts in 1969 (Tr. 671-672, 1208-1214).

** While Ottley had obtained authorization from the Executive Board for the use of an automobile for himself, he never attempted to secure similar authorization for Byrne's car.

ARGUMENT

POINT I

There was ample evidence of Ottley's guilt both as to his failure to maintain and keep records of reimbursed expenses and as to his aiding and abetting embezzlement of union funds.

A. The Embezzlement Counts

There was more than ample evidence from which the jury could conclude that Ottley was guilty of aiding and abetting Byrne's embezzlement.* Of the 16 automobile rentals paid for from union funds, it is clear that the only rental authorized in conformity with the constitution and by-laws of the Local, was the one for the automobile leased for Ottley as President. Thereafter, at his instance, automobiles were simply leased for 15 other union employees. In the case of Byrne, the misuse of union funds was flagrant. Considering the evidence in the light most favorable to the Government, as the Court must at this stage, *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972), the jury was fully entitled to find that Ottley knew Byrne was using the automobile solely for his personal benefit. He knew that Byrne had no license because he could not see well enough to drive. Further, each week Ottley approved Byrne's request for reimbursement for expenses incurred in traveling to and from union busi-

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* Ottley claims that the sufficiency of the evidence should be determined solely from the Government's direct case. However, in this Circuit it is settled that when a defendant offers evidence, as Ottley did, all the evidence should be considered. *United States* v. *Tramunti*, Dkt. No. 74-1398 (2d Cir., July 12, 1974) slip op. at 4813; *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1208 n. 7 (2d Cir. 1973).

ness by taxi, while the car leased for precisely that purpose remained in a parking lot near his wife's place of business. Ottley also did not authorize or pay a chauffeur for Byrne. Having known Byrne since 1937, he was well aware that Mrs. Byrne was otherwise employed and not available to chauffeur Mr. Byrne around. Furthermore, Ottley signed checks each month in payment for the leasing of the car and for the gas and oil which were charged on a Texaco credit card in the name of Peter Byrne, but the receipts for which were, without exception, signed by Virginia Byrne.

The evidence was more than sufficient to prove Byrne's embezzlement of the amounts in excess of $11,000, charged in Counts 27 and 28, and upon the correct charge to the jury was sufficient to convict Ottley of aiding and abetting that embezzlement by Byrne, and, in fact, of initiating and continuously approving that embezzlement over a period of years commencing in 1962. *United States* v. *Colosacco*, 196 F.2d 165, 167 (10th Cir. 1952), *United States* v. *Terrell*, 373 F.2d 872 (2d Cir. 1973); *United States* v. *Garguilo*, 310 F.2d 249 (2d Cir. 1962).*

B. The Record Keeping Count

Ottley's guilt on the charge of failing to maintain and keep the necessary vouchers, receipts and worksheets which the Secretary of Labor might use to verify, explain or clarify and check for accuracy and completeness the annual reports which Local 144 was required to file, was

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* Byrne's opinion that a union purpose was served because the car provided transportation from home to subway is irrelevant. The jury, in any event, was free to disregard this self-serving rationalization, which, if controlling, would mean that his shoes, his clothing and his food serve a union purpose since they, too, are obviously necessary in order to attend to union work. See *United States* v. *Harmon*, 339 F.2d 354, 356 (6th Cir. 1964), *cert. denied*, 380 U.S. 944 (1965).

equally conclusively proven. Assuming the correctness of the court's charge on the law respecting this count,* the jury only had to decide two matters in determining Ottley's guilt: 1) were the records Ottley maintained and kept the kind required by Section 436,** and 2) if they were not, did Ottley act wilfully (as the court defined the term) in failing to maintain and keep such records?

With respect to the first element, there is no disagreement about what Ottley did; each week in the years charged a slip of paper marked "reimbursed expenses" with an amount was submitted to the union's office manager, and then paid by union check which Ottley co-signed. Defendant concedes that these slips do not even contain a breakdown of what the money was spent for, or where it was spent. Moreover, and more significantly, no receipts for these expenditures were either obtained or preserved by Ottley, let alone submitted with his weekly "voucher".

This uncontradicted evidence was more than sufficient for the jury to find that the record keeping for which Ottley was responsible fell below the statutory standard. Indeed, on this issue, defendant, in his brief (Br. 36-39) concedes that sufficient evidence was before the jury.

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* Discussed, *infra* at pp. 26-29.

** Section 436 provides:

> Every person required to file any report under this subchapter shall maintain records on the matters required to be reported which will provide in sufficient detail the necessary basic information and data from which the documents filed with the Secretary may be verified, explained or classified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions, and shall keep such records available for examination for a period of not less than five years after the filing of the documents based on the information which they contain.

Defendant contends, however, that the evidence was insufficient with respect to the second element, wilfulness. The evidence on this element, however, was compelling. To prevail on this issue, the Government had only to prove a reckless disregard of the law's requirement on the part of the defendant. The evidence however may fairly be said to support a finding that the defendant acted in *knowing* disregard of his specific statutory duties.

Thus, the jury had before it Ottley's own admission that he knew the LMRDA was a restrictive statute designed to protect the funds of the union membership by proper records which were to be kept for five years. They also could consider that in 1959, shortly after the enactment of the LMRDA, Ottley signed the LM-1 form, which contained the text of Section 436 directly above his signature, and that each year thereafter he signed the LM-2, which set forth the amount of reimbursed expenses paid to him by the Local in the previous year. Furthermore, Ottley's unquestioned expertise in the affairs of union organization and management for nearly 25 years, as president of the Local, vice president of the International and trustee of the welfare funds, was strong evidence from which the jury could find that Ottley was well aware of his statutory obligations. Finally, the jury was entitled to find that the persistent efforts of the International's leadership and the local's attorneys over the years to alert union officers of the existence and scope of the LMRDA, and officers' responsibilities thereunder, were successful in Ottley's case, and that he was aware, from his attendance at conferences and meetings, and from reading union literature, that he was required to maintain and keep the records necessary to verify the statements in the LM-2 reports. From all this evidence the jury well could have found that Ottley deliberately attempted to avoid maintaining and keeping the receipts, vouchers and worksheets necessary to verify the Union's report of reimbursed expenses paid to him each year.

Moreover, it is clear that since Ottley (1) knew of the existence of the LMRDA, (2) was the officer required to sign and file the annual reports, and (3) knew that no verification existed of when, where and how the monies he was claiming as reimbursed expenses were expended, the jury was entitled to conclude that Ottley had recklessly disregarded his duties to maintain and keep the necessary receipts, vouchers and worksheets.

In sum, the evidence on both the embezzlement counts and the record keeping count was more than sufficient for the jury to reach its guilty verdicts.

POINT II

The trial court properly charged the jury concerning the automobile expenditures.

Judge Frankel instructed the jury that the defendant could not be found guilty of aiding and abetting the embezzlement of union funds through the expenditures for Byrne's automobile if the jury found that the expenditures were authorized by the union, or if, in good faith, Ottley believed they were authorized (Tr. 1540). Appellant claims that the jury should have been further instructed that he was entitled to an acquittal if they found that he had a good faith belief that the unauthorized automobile expenditures were for a union benefit. This argument lacks merit.

Section 501(c) provides:

> "Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

By its terms the statute does not include the defense which Ottley seeks to engraft upon it. Such a defense would be demonstrably inconsistent with the statutory purpose and would substantially impair its efficacy if it received judicial approval.

Only one case, *United States* v. *Goad*, 490 F.2d 1158, 1165 (8th Cir. 1974), which affirmed the convictions of four union officials who had knowingly taken salary increases without proper authorization, has expressly decided the issue presented here. In *Goad* the Eighth Circuit unequivocally rejected the view that "'lack of benefit to the union is an essential element . . .' of the crime prohibited by Section 501(c), 490 F.2d at 1165. After carefully analyzing the statute and decisions construing it, the Court of Appeals concluded:

> "In summary, fradulent intent to deprive the union of its funds and a demonstrated lack of authorization, is sufficient for a prosecution under § 501(c). Lack of union benefit is not essential but fraudulent intent must be proved; that is, the intent to deprive the union of its funds, not an intent to deprive the union of its funds that are not expended for union benefit. For example, if by mistake or accident a union official spends funds that are unauthorized, he is not liable under § 501(c)." *Id.* at 1166.

Proof of fraudulent intent is established by evidence that the defendant "knowingly" expended union funds "not authorized according to the union's constitution and bylaws," *Id.* at 1165, and is not vitiated by a belief that the expenditure might benefit the union:

> "*United States* v. *Bryant*, 430 F.2d at 239, held that "willfulness is an essential element of the offense charged." Willfulness or criminal intent is commonly defined as an "act (or omission) * * *

committed (or omitted) by defendant voluntarily with knowledge that it was prohibited by law, and with the purpose of violating the law, and not by mistake, accident or good faith." *United States* v. *Rabb,* 394 F.2d 230, 232 (3rd Cir. 1968), *quoting* Manual on Uniform Jury Instructions in Federal Criminal Cases of the United States District Court for the Northern District of Illinois, 33 F.R.D. 529, 553 (1963). We think, under the circumstances of this case, *"good faith" cannot include, as a matter of law, spending union funds thinking it proper since the union would benefit from the expenditure.* The fiduciary responsibility requires union officials to follow the proper procedures to authorize the expenditure of funds. A union official cannot be acting in "good faith" when not following his union's own procedures for authorizing expenditures. *An elected union official must know the proper procedures for conducting his union's business."* (emphasis added; *Id.* at 1166 n. 10).

The definition of intent to defraud established in *Goad* clearly excludes good faith belief in a union benefit as a defense. The holding in *Goad,* wholly ignored by appellant, controls the instant case and squarely supports Judge Frankel's charge, which correctly limited the defense of "good faith" to a good faith belief that the expenditure had been properly authorized by the union.

Defendant relies principally upon this Court's decision in *United States* v. *Silverman,* 430 F.2d 106 (2d Cir. 1970), *cert. denied* 402 U.S. 953 (1971) to support his view that Judge Frankel's charge was erroneous. This reliance is misplaced.

In *Silverman,* Judge Moore, writing in dissent, and focusing on the issue of whether a benefit to the union

would remove a particular unauthorized expenditure from the ambit of Section 501(c), articulated the elements of a Section 501(c) violation in his discussion of the "political contribution" counts in that case:

> ". . . a conviction under section 501(c) may be made out by a demonstration of a fraudulent intent to deprive the union of its funds *and* either a lack of bona fide authorization *or* an absence of benefit to the labor organization from the expenditure." (emphasis added); 430 F.2d at 117.

Judge Friendly, writing for the majority in *Silverman*, did not discuss the component elements of the crime under 501(c), but assumed *arguendo*, that Judge Moore's formulation was correct, and reversed for insufficient evidence. Judge Moore's view in *Silverman*, as well as that of the court in *Goad*, is that an incidental union benefit (and consequently a belief in such a benefit) does not constitute a defense where fraudulent intent and lack of authorization are established.

The statutory scheme of which Section 501(c) is an integral part evinces a clear Congressional intention to circumscribe the conduct of union officers by the highest standards of fiduciary responsibility. 29 U.S.C. § 501(a).

> "The members of a labor organization are the real owners of the money and property of such organizations and are entitled to a full accounting of all transactions involving such money and property. Because union funds belong to the members they should be expended only in furtherance of their common interest. A *union treasury should not be managed as though it were the private property of the union officers, however well intentioned such officers might be, but as a fund governed by fiduciary standards.*" U.S. Cong. & Admin. News Vol. 2, 86th Cong., 1st Sess. 1959, H. Rep. No. 741 at 2430 (emphasis added).

The sanctions imposed under Section 501(c) are designed to prevent "the unauthorized expenditures of union funds with a fraudulent intent alone. . . ." *Goad, supra,* 490 F.2d at 1165. The statute seeks to limit the unfettered exercise of power by union officials in the expenditure of union funds and to insure that such expenditures are made only with proper approval. *Id.;* see also, *Silverman, supra,* 430 F.2d at 113. Proper authorization, as Judge Frankel recognized, is the critical question, for without it the preservation of union funds would depend upon the unrestrained discretion of those in power. In *Silverman,* Judge Moore aptly explained this rationale as follows:

> "To hold otherwise would be to encourage the free-wheeling exercise of dictatorial power by labor leaders over the membership of their unions. Lawless transactions would occur which were only arguably or through the use of hindsight for the benefit of the union. Enforcement of "high standards of responsibility and ethical conduct" would be curtailed when the unbridled use of union funds can be immunized from the sanction of criminal liabilities by the fortuitous existence of a collateral union benefit. Overzealousness in government supervision of the fiduciary role of labor leaders is avoided by the requirement that a criminal intent be demonstrated in addition to the lack of either authorization or union benefit. The existence of a bona fide union benefit would be strong evidence that there was no intent to deprive the union of the use of its funds." 430 F.2d at 115.

Under appellant's view, even if a union official lacked authorization to make an expenditure of union funds and knew that he lacked such authorization, or even if he knew he was *prohibited* from making that expenditure, his subjective belief the union would benefit therefrom would be enough to bar the applicability of the statute's criminal

sanctions. Such a reading would emasculate Section 501(c) and thwart the achievement of the salutary purpose it was designed to achieve.*

In support of his argument that a union official who in good faith believes that he is expending monies for the benefit of his union cannot be guilty of embezzlement, Ottley relies on the fact that other embezzlement statutes have been construed to require an intent to injure or defraud the owner of the property, an element said to be inconsistent with such a belief. It is clear, however, that an intent to injure or defraud also is an essential element of the offense prohibited by Section 501(c). It is proved when the evidence establishes that the defendant knew that he was acting without proper authorization and approval.

If appellant were correct, a showing of lack of union benefit would be an essential part of the prosecution's burden of proof. Almost every expenditure of union funds, particularly for the personal benefit of union officials, might be viewed as having some incidental union benefit, the mere existence of which would compel a jury to find that a good faith belief in such a benefit existed. As the Eighth Circuit noted in *Goad* "several 'felonious taking' statutes do not require a showing of lack of benefit." 490 F.2d at 1165. Requiring proof of lack of union benefit in a prosecution under Section 501(c) would create an almost insurmountable obstacle to conviction. Furthermore, it would be almost impossible to establish affirmatively (in those rare cases where no union benefit actually occurred) that the defendant did not believe in the *possibility* of some union benefit.

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* Indeed, during the course of the trial both Ottley and his counsel perceived that the "belief in union benefit" excuse was untenable and inconsistent with the purposes of the LMRDA. Significantly, the defendant himself made it clear that he did not believe that he could spend or cause the spending of his union's funds for "mixed benefit" items without proper authorization, or at least a belief that the expenditures had been authorized (Tr. 1280-1281).

Finally, defendant's contention that Judge Frankel's charge eliminated from the jury's consideration the bulk of the evidence relating to Byrne's car, is incorrect. First, it should be emphasized that Ottley was charged with aiding and abetting Byrne's embezzlement. Judge Frankel properly charged that the jury first had to find Byrne guilty of an embezzlement, and then must find that Ottley not only had knowledge of the embezzlement, but participated in it or caused it (Tr. 1549-1550). Under the District Court's instruction, the jury had to consider all the evidence relating to the elements of the offense, including whether Byrne derived a substantial personal benefit from the use of the car and the extent of Ottley's knowledge of how the car in fact was used and his participation in securing its continuing use with union funds. The jury was instructed that it had to determine whether in this case there were

> ". . . unauthorized expenditures or uses of union funds for personal benefit of the officer doing that or for the personal benefit of others to whom he diverts the funds or on behalf of whom he makes the expenditures" (Tr. 1538).

Furthermore, the jury was required to consider the "understanding with which the items were bought or paid for," and to consider "all the evidence . . . in determining whether the charges of embezzlement had been made out with respect to [each] particular item" (Tr. 1543; see also Tr. 1544, 1546-1548).

Finally, the circumstances of Ottley's authorizing expenses for Byrne's car, the nature of previous such approvals, Byrne's eye condition as Ottley perceived it, and Byrne's actual use of the car, or whether there was a use for union purposes, and Ottley's knowledge thereof, all could have been considered by the jury in evaluating Ottley's defense of good faith belief in authorization. In-

deed, it was critical for the jury to consider whether Ottley could reasonably have believed that the union had authorized expenditures for the car as Byrne was using it, and what Ottley's knowledge of that use was.* Judge Frankel's charge encouraged the jury to consider all of the evidence in connection with the defendant's contention that he believed such expenditures had been authorized (Tr. 1556-1558).

POINT III

Ottley was a "person required to file reports" under the LMRDA and was properly convicted for failing to comply with Section 436 of the Act.

Defendant contends that he is not a "person" required to file a report under Section 431, and is therefore not directly subject to the requirement of Section 436 that such persons maintain and keep available the records necessary to verify reimbursed expenses. There is no merit to this claim.

Section 431 requires labor unions to file reports annually with the Secretary of Labor; Section 439 requires the president and treasurer of the union to sign those reports, and holds them personally responsible for their filing as well for any statements contained therein which they know to be false.**

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* This is, of course, harmonious with Judge Moore's view that a union benefit may be persuasive on the issue of fraudulent intent. 430 F.2d at .

** Sections 402, 431, 436 and 439 provide, respectively, in relevant part:

§ 402. Definitions

For the purposes of this chapter—

* * * * *

(d) "Persons" includes one or more individuals, labor

[Footnote continued on following page]

organizations, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

* * * * *

§ 431

(b) Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail, as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year—

* * * * *

(3) salary, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer and also to each employee who, during such fiscal year, received more than $10,000 in the aggregate from such labor organization and any other labor organization affiliated with it or with which it is affiliated, or which is affiliated with the same national or international labor organization;

§ 436

Every person required to file any report under this subchapter shall maintain records on the matters required to be reported which will provide in sufficient detail the necessary basic information and data from which the documents filed with the Secretary may be verified, explained or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions, and shall keep such records available for examination for a period of not less than five years after the filing of the documents based on the information which they contain.

§ 439

(a) Any person who willfully violates this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

* * * * *

(d) Each individual required to sign reports under section 431 and 433 of this title shall be personally responsible for the filing of such reports and for any statement contained therein which he knows to be false.

The president's responsibility under Section 439 is co-extensive with the union's filing responsibility—the statute looks to the president for accountability for filing on behalf of the union. The president thereby becomes the union's alter ego, quite literally, the "person required to file" the annual financial report. Section 436 imposes the record keeping requirement upon those same "person(s) required to file" the annual financial reports; necessarily this must include the president of the union, here, Ottley.

Under defendant's view of the statute, no individual may be held directly accountable for failing to maintain and keep the required records, but only through the application of the aiding and abetting statute, i.e. by causing the union to violate the statute by not maintaining and keeping the necessary records. Defendant's construction of the statute would result in the anomalous situation in which a union president or treasurer may be personally responsible for the failure of the union to file the required financial report, but no individual will be directly responsible for the union's far more significant responsibility to maintain and keep the records necessary to insure that such annual filings are not fraudulently or erroneously made. Plainly the Act was not so intended, nor should it be so interpreted. Since Congress intended the president of a union to be accountable for failure to file its annual reports, so too it necessarily intended that he be responsible for the creation and preservation of the records supporting the reports for whose accuracy he annually vouches with his signature.

This must be particularly so in the circumstances of this case. Here the president of the union annually signed reports knowing that he had neither maintained nor kept receipts or vouchers to verify his *very own* reimbursed expenses.

Moreover, defendant's position, if accepted, would create an unfair application of the criminal sanctions under Section 439 that Congress manifestly did not intend.

Employers are "persons required to file" reports under Section 433, must maintain and keep the requisite records under Section 436, and are liable for failure to comply with the record keeping requirements under Section 439 (a). "Employers" however, include individuals and partnerships. Defendant's construction of the statute would penalize employers operating in an individual or partnership capacity, but would impose no criminal sanctions upon officers of corporations for failing to comply with Section 436. The inequity of this construction of the statute is increased by the fact that in the usual situation, criminal sanctions will be imposed on small businessmen. Within the larger entities, corporations and unions, in which the necessity for accurate record keeping is made all the more imperative, by the size and complexity of the organization, no individual criminal responsibility could be imposed. Clearly Congress did not intend this result. The nature of the organization of the entity required to file the reports under Sections 431 and 433 cannot be permitted to determine individual criminal liability under the LMRDA.

Defendant contends that an interpretation of Section 436 requiring a union president to insure that all other officers prepare and submit adequate vouchers and receipts is unjust; union presidents do not have such a mandate from their unions.* This conclusion ignores the fact that the Constitution and By-Laws of the Local (with which Ottley expressed great familiarity during the trial) specifically give the president that mandate:

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* It is worth noting here that at least within this Local such a task would not have been the least bit onerous; Ottley and Byrne were the *only* individuals receiving reimbursed expenses.

"Article VI

Duties of Officers

Section 1. The President . . . shall generally supervise the administrative officers of the Local and shall assist the elected officers in the carrying out of their duties. He shall have authority and supervisory powers over all and any business representatives and the staff of the Union. The Executive Board, upon the President's recommendation, shall have the authority to hire legal counsel, accounting, clerical and organizational workers. He shall make it his business to familiarize himself with the facts concerning conditions in the industry and shall supervise all organizational plans and campaigns." GX 7.*

Finally, defendant further suggests that responsibility for Section 436 record keeping would impose inordinate burdens upon union presidents. This is clearly not so, for liability under Section 436 is conditioned upon a *wilful* failure to keep such records. Thus the President could not disregard his duty to insure a complete record keeping system for all receipts, vouchers, and worksheets, but by the same token, could not be held accountable for fraudulent or inaccurate receipts or vouchers, submitted by others, unless of course, he knows them to be false or inaccurate. The President's responsibility lies in the middle ground; he must oversee a record keeping system and make honest efforts to insure that all reimbursed expenditures are verifiable—that is all the Act reasonably requires.

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* Article VIII, Section 8 of this same constitution also mandates that "all records pertaining to income, disbursements and financial transactions of any kind whatsoever shall be kept for a period of five years." Exhibit 10(d).

POINT IV

The trial court's charge on willfulness under Section 439 was proper and not misleading.

The trial court properly charged the jury that willfulness was proven under Section 439, if it found that the defendant had acted in reckless disregard of the law's requirements.

Defendant contends that the court should have charged the jury that the government was required to show bad purpose or evil motive on his part. Neither *United States* v. *Murdock,* 290 U.S. 389 (1933) nor *Morrissette* v. *United States,* 342 U.S. 246 (1951), on which Ottley relies, reject recklessness as an appropriate measure of willfulness Thus, the Supreme Court stated in *Morrissette*:

> "Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition, for the law on the subject is neither settled nor static." 342 U.S. at 260.

In *Murdock,* the standard of recklessness was explicitly recognized:

> "The word [wilfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. *The word is also employed to characterize a thing done without ground for believing it is lawful or conduct marked by careless disregard whether or not one has the right so to act"* [emphasis added]. 290 U.S. at 394-5.

The courts have frequently interpreted the term "willful" to mean a reckless disregard for whether or not one has the right to act in a certain fashion. This definition has been applied in tax cases, *United States* v. *Douglass*, 476 F.2d 260, 263 (5th Cir. 1973) (involving a tax statute virtually identical to the one in *Murdock*), securities laws violations, *United States* v. *Benjamin*, 328 F.2d 854, 862-3 (2d Cir. 1964), and in numerous other areas of the criminal law, *e.g.*, *United States* v. *Sarantos*, 455 F.2d 877 (2d Cir. 1972); *United States* v. *Joly*, 493 F.2d 672 (2d Cir. 1974); *United States* v. *Olivares-Vega*, 495 F.2d 827 (2d Cir. 1974); *United States* v. *Jacobs*, 475 F.2d 270, 286 (2d Cir. 1973); *United States* v. *Brawer*, 482 F.2d 117, 127 (2d Cir. 1973); *United States* v. *Thomas*, 484 F.2d 909 (6th Cir. 1973), see also *Brown* v. *Bullock*, 294 F.2d 415, 420 (2d Cir. 1961).

The leading case interpreting the phrase "willfully" as used in Section 439, *United States* v. *Budzanoski*, 462 F.2d 443 (3d Cir. 1972), affirms the correctness of the court's charge in this case. There, union officials were accused of making false entries in the union's books of account, or failing to make accurate ones. The defendants contended that the court there erred in charging the jury that it could convict if it found that the defendants acted in reckless disregard of the law. In rejecting the defendants' claim, the Court of Appeals stated:

> While wilfulness, when employed in a criminal statute, generally means an act done with bad purpose, it "is also employed to characterize a thing done without ground for believing it is lawful [citation omitted], or conduct marked by careless disregard whether or not one has the right so to act [citation omitted] . . ." United States v. Murdock, 290 U.S. 389, 394-359, 54 S.Ct. 223, 225, 78 L.Ed. 381 (1933). To determine the meaning of the word, it is appropriate to resort to the context in

> which it is used. Id. The LMRDA imposes serious fiduciary responsibilities on union leaders. They must take the utmost care in their stewardship of their members' funds. Section 501 of the LMRDA, 29 U.S.C. § 501. Sabolsky v. Budzanoski, 457 F.2d 1245 (3d Cir. 1972); Johnson v. Nelson, 325 F.2d 646 (8th Cir 1963). Further, the purpose of the LMRDA is not just to prevent embezzlement and fraud; as we have noted, it is to provide information for the members so that they can control their leaders. Therefore, even when false statements or omissions are not elements of schemes to defraud, they obstruct legitimate goals of the LMRDA. However, the elimination of a requirement of evil intent or bad purpose will not operate as a trap for the unwary. There can be no basis for asserting a lawful purpose for the knowing entry of deceptive statements or the omission of accurate ones in books of account. Knowledge of false statements or misrepresentations of material facts done in reckless disregard of the law is sufficiently culpable conduct to merit punishment under Section 209. United States v. Haggerty, supra, 419 F.2d at 1008, 1009. cf. United States v. Sarantos, 455 F.2d 877, 881-882 (2d Cir. 1972); Brown v. Bullock, 294 F.2d 415, 420 (2d Cir. 1961). 462 F.2d at 452.

The Court's reasoning in *Budzanoski* is no less applicable to this case. Defendant's effort to distinguish it on the basis that *Budzanoski* involved a claim of false entries is unpersuasive. The statutory purposes underlying the false entry and record keeping provisions are identical. Permitting a lesser standard of conduct for union officers charged with keeping the very records upon which the Secretary of Labor and the unions' membership must rely to ascertain whether the reports which are filed are inaccurate or fraudulent would serve only to seriously dilute the fiduciary standard to which union officers must adhere.

Defendant's further contention that, assuming reckless disregard to be the proper standard, the court's charge nevertheless was erroneous, is frivolous. The failure of the court to charge that the defendant must have acted with a reckless disregard of the law *and* a conscious purpose to avoid learning the truth, is not error. *United States* v. *Sarantos, supra, United States* v. *Brawer, supra, United States* v. *Thomas, supra.* The District Court plainly defined "reckless disregard" in terms of "deliberate indifference or refusal to be informed" (Tr. 1533-1534). The further claim that the court's charge is internally inconsistent and confusing, particularly respecting mere negligence, is equally without merit. Even if it can be said that the court was charging that if the jury found that Ottley failed to make reasonable efforts to know his fiduciary obligations, then a reckless disregard had been established, the Court's formulation was correct. Ottley's apparent claim that a fiduciary who fails to make an effort to learn his fiduciary duties is mere negligence, and does not amount to a conscious purpose to avoid the truth, or is not an indifference to his legal obligations, is absurd on its face and requires no discussion.

POINT V

The jury properly found that Ottley did not comply with the requirements of Section 436; Section 436 is not unconstitutionally vague.

Ottley was required under Section 436 to maintain and keep all "vouchers", "receipts" and "worksheets" with which the Secretary of Labor and the union membership could verify the accuracy of the information contained in the LM-2 reports submitted annualy by the Local to the Department of Labor. Ottley contends that the "vouchers" submitted by him or on his behalf each week, and on the basis of which he was reimbursed for his claimed petty cash expenditures, were adequate compliance with the

statute. He further argues that if the statute requires more than the vouchers, it must be invalidated on grounds of vagueness. Neither claim has merit.

Appellant repeatedly asserts that the vouchers were "unchallenged as to accuracy." This of course, begs the question. The vouchers were not challenged because Ottley's conduct eliminated the possibility of any verification. There was no way that anyone—union member, Department of Labor official, accountant—could determine whether the amounts claimed were actually spent, for what purpose they were spent, and when and where they were spent. Ottley knew that his claims for his reimbursed expenses could not be verified without the additional necessary information, and this is precisely why he chose not to retain the statutorily required documentation. Indeed, defendant's own definitions of the term "voucher" quoted at page 51 of his brief stress that the term encompasses "evidence" or "proof" of the actual expenditure claimed. Moreover, defendant completely ignores the statutory requirement that "receipts" be maintained and kept available for inspection. Any receipts received by Ottley for his out-of-pocket expenditures were never submitted with his vouchers. Ottley's conduct was a striking departure from the practice of other Local officials (Byrne excepted) who received weekly fixed allowances, but nevertheless submitted receipts for all their expenses, together with detailed vouchers like Byrne's. Indeed, Ottley actually destroyed the notes he claimed to have made which would have given a breakdown of how his expenses were incurred. Ottley's behavior was nothing short of intentional concealment of the necessary means by which verification could be achieved.

Under Section 436 no specific bookkeeping system is required, *United States* v. *Budzanoski*, 462 F.2d 443, (3d Cir. 1972). The statute demands no more than the means by which any union member and the Government can

verify when where and how a union official spent the money the union reimbursed him for. In this case, a breakdown on the voucher of where, when and for what the money was spent, together with the simple expedient of retaining and attaching the receipts he received or could have obtained for his expenses, would have satisfied the duty imposed by Section 436. The vouchers submitted, many of which were submitted on Ottley's behalf in his absence by Mrs. Wachtel, often furnished nothing more than estimates of what Ottley spent which concededly bore little relation to the amount actually spent. They were clearly insufficient.

Ottley also claims that the statute only requires him to preserve any records which happen to be created, and places him under no obligation to create or make any records. This contention does not withstand analysis. Ottley's claim that "maintain" in the context of Section 436 only means "preserve", would, of course, mean that when the LMRDA was enacted in 1959, this section created no duty upon unions and their officers to create records, but only to retain what they already had. The statute, therefore, would have had no prospective application; only violations which existed at the time of the enactment could be prosecuted. The broad remedial scope of the LMRDA would be narrowed to a pinhole with such a constricted interpretation of Section 436. Moreover, the language of Section 436 clearly indicates that unions and their officers are under a duty to *create and preserve* the necessary records. Thus, Section 436 speaks of the duty to "maintain . . . and keep . . . available" these records. Defendant's interpretation of the statute would render the phrase "keep . . . available", as joined by the conjunctive "and", utterly redundant. To make any sense, the two phrases must be construed to mean the creation and retention of the necessary records to enable the statements in the annual reports to be verified. This interpretation does no violence

to the dictionary meaning of the word maintain,* and is consistent with the purpose of the statute.

Finally, Ottley's contention that this construction of Section 436 is unconstitutional is without merit. This court must construe the statute in such fashion as to avoid a danger of unconstitutionality, and where a general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague. *United States* v. *Harriss*, 347 U.S. 612, 618 (1954). Moreover, as *Harriss* teaches, if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, the courts must accord the statute that interpretation. To do this, the court may "extrapolate [the] allowable meaning" of the statute, taking into account its text, the legislative history, and the interpretations of the statute given by those charged with enforcing it. *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1971).

Manifestly, the terms of the statute itself and its application to Ottley's behavior, are reasonable, and create no "trap for the unwary". As previously stated, all that

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* *E.g.*, Black's Law Dictionary, 4th Ed. 1951: maintain . . . "it is variously defined as acts of repairs and other acts to prevent a decline, lapse or cessation from existing state or condition bear the expense of; carry on; commence; continue; keep; . . . keep in existence or continuance; preserve; supply with what is needed. . . . To maintain an action or suit may mean to commence or institute it. . . ." Indeed, under Section 436 maintain will have a number of meanings—the creation and maintenance of the necessary vouchers and worksheets as well as the retention of the necessary receipts. The definition of "keep", it may be added, may also be construed to require the creation of the necessary records; Black's *supra*, keep . . . "to maintain continuously and methodically for the purposes of a record; as to "keep" books. . . . Thus to "keep" records of court means, not only to preserve the manual possession of the records, books, and papers but to correctly transcribe therein the proceedings of the court."

is required is a reasonable effort to create and preserve those records which ordinarily will enable the statements contained in the annual reports to be verified. Such a construction does not violate the due process protection of the Fifth Amendment, and the courts which have considered the constitutionality of this statute have uniformly agreed. *United States* v. *Budzanoski; supra; United States* v. *Haggerty,* 419 F.2d 1003, 1008 (7th Cir. 1969).

POINT VI

The trial court's evidentiary rulings were correct.

Ottley complains of two rulings made by Judge Frankel during the trial; the first allowed the introduction of various documents mailed by the International to officers of the Local, relating to the provisions of the LMRDA, and testimony concerning lectures that were given to acquaint the union's officers with the Act; the second excluded further testimony by Ottley concerning his purported reliance upon alleged statements by an unidentified person connected with the Internal Revenue Service concerning the adequacy of Ottley's documentation of his reimbursed expenses claimed in his tax returns. Ottley's claim that these rulings denied him a fair trial wholly lacks merit.

This court has often reiterated the proposition that "ordinarily a ruling on the relevancy of evidence depends upon the exercise of the sound discretion of the trial judge and will not be disturbed upon appeal except for grave abuse." *United States* v. *Gottlieb,* 493 F.2d 987, 993 (2d Cir. 1974). It is equally well settled that the trial court "has a measure of discretion in allowing testimony which discloses the purpose, knowledge or design of a particular person." *Glasser* v. *United States,* 315 U.S. 60, 81 (1942).

Thus, with respect to the testimony of the union officers and lawyers concerning the lectures given to acquaint officers like Ottley with the LMRDA and the documents mailed by the International, there can be no real dispute that these matters were relevant.* Appellant's knowledge of the record-keeping provisions of the Act and his duties thereunder were vigorously litigated. The lectures were connected to the defendant, both by the evidence of his claims for repayment for attending the Chicago convention,** and his attendance at Executive Board meetings after 1964. With respect to the union literature, Ottley conceded having read Government's Exhibit 47, which contained the text of the Act, and conceded receiving the International's quarterly magazine. Evidence of the conferences was offered by the testimony of participants. The union literature was properly admitted as business records. Thus, the evidence of the periodicals and lectures was relevant, probative *** and connected to the defendant, and its admission was proper.

Similarly, the exclusion of defendant's proferred testimony concerning his conversations with an IRS agent was proper and within the sound discretion of the court. The testimony offered by the defendant was properly excluded; its marginal relevance was significantly outweighed by its remoteness and the collateral issues which would have

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* The "rather low test of relevancy" was defined in *United States* v. *LaFroscia*, 485 F.2d 457 (2d Cir. 1973) as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence'."

** Ottley admitted that he attended this conference, to which a day and a half was devoted to an explanation of the Act (GX 81).

*** If, as defendant suggests (Br. 34) the bulk of the Union periodicals had no relevance to the provisions of the Act at issue, their introduction could hardly have prejudiced the defendant—nor does defendant explain what prejudice occurred from their admission. The significance which defense counsel accorded these documents is evidenced by his passing mention of them in summation (Tr. 1475). Thus, even if the documents were improperly admitted, the court's error was not prejudicial.

been introduced by its admission. *United States* v. *Kahaner,* 317 F.2d 459 (2d Cir. 1963).

Ottley could only speculate at the year the conversation occurred ("think it was in 1959"), and was unable to identify the man with whom he spoke,* despite the fact that counsel claimed Ottley could produce a memorandum he allegedly sent to the IRS to substantiate his claims. Thus, the government would have been entitled, indeed, obliged, to investigate this claim during the course of the trial, perhaps occasioning a delay for a search of the records, and for the agent, and certainly would have been entitled to adduce proof, as well as have a charge to the jury, concerning the different objectives of the Internal Revenue Act and the LMRDA, as well as the practice of the IRS concerning verification of amounts of reimbursed expenses.

Finally, the gist of the proferred evidence was conveyed to the jury by Ottley's testimony before the court cut off that line of inquiry.** The only thing the trial judge did not let Ottley say was that he thought the type of compliance he made with the IRS was equally sufficient under the LMRDA. If, as defense counsel asserts, the IRS

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* Counsel had the opportunity to consult with Ottley during the day between the conclusion of his direct testimony and the commencement of his redirect. Despite this, no offer that Ottley could name the agent or pinpoint the date was forthcoming from counsel.

** Ottley testified as follows:

> Q. Did you ever have a problem with the Internal Revenue Service concerning reimbursed expenses? A. I don't know if it was a problem. I know I was summoned to appear, I think it was in 1959, to justify my expenses, which I claimed that I had spent for the union organization.
>
> Q. Were you able to explain to the IRS your reimbursed expenses. A. Yes I did.
>
> * * * * *
>
> Q. Did you submit to the IRS a memorandum? A. I did" (Tr. 1064-1065).

occupies such a powerful position in the minds of laymen, then the jury had no difficulty in inferring that Ottley was claiming that he thought what was sufficient for the IRS also was sufficient for the Department of Labor and the union.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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JOEL N. ROSENTHAL,
LAWRENCE S. FELD,
Assistant United States Attorneys, Of Counsel.

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Joel N. Rosenthal being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 26 day of August, 1974 he served 2 copies of the within briefs by placing the same in a properly postpaid franked envelope addressed:

Waldman & Waldman
501 Fifth Avenue
N.Y. NY 10017

And deponent further says that he sealed the said envelope and placed the same in the mail box drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Joel N. Rosenthal

Sworn to before me this

26 day of AUGUST, 1974

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975